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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 1096 OCTOBER TERM, 1945.

83

INDEPENDENT WAREHOUSES, Inc., and PENNSYLVANIA COAL COMPANY and ERIE RAILROAD COMPANY, intervening parties,

Appellants,

vs

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees,

JAMES THOMPSON,

Appellant,

vs.

Same,

Appellees.

On Appeal from the New Jersey Court of Errors and Appeals.

APPELLANTS' BRIEF ANSWERING APPELLEES' STATEMENT OPPOSING JURISDICTION, AND OPPOSING APPELLEES' MOTION TO DISMISS THE APPEAL, AND AFFIRM THE JUDGMENTS BELOW.

CLEMENT K. CORBIN,
Attorney for Petitioners, Independent Warehouses, Inc., and James Thompson,
No. 1 Exchange Place,
Jersey City, New Jersey.

WILLIS T. PIERSON,
DUANE E. MINARD,
Attorneys for Petitioners, Pennsylvania Coal Company, and Erie Railroad Company.
1180 Raymond Boulevard,
Newark 2, New Jersey.

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Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

INDEX

	PAGE
CITATIONS:	
Federal Statutes	i
Table of Cases	i
STATEMENT	1
ARGUMENT	1
Point 1	1
Point 2	6
Point 3	19
Point 4	21
Point 5	25
CONCLUSION	33

FEDERAL STATUTES.

28 U. S. C. A., Sec. 344(a) (Judicial Code Sec. 237(a)	2
49 U. S. C. A., Interstate Commerce Act:	
Sec. 1, par. (1), clause (a) pars. (2), (3), (4), (5), (6)	3
Sec. 6, pars. (1), (3), (4), (5), (6), (7) and (10)	3

TABLE OF CASES.

Bacon v. *Illinois*, 227 U. S. 504	18
Baltimore & O. R. Co. v. *United States*, 24 Fed. Supp. 734	9
Cargill v. *Minnesota*, 180 U. S. 452	16
Carson Petroleum Co. v. *Vial*, 279 U. S. 95	9, 10, 18
Cotting v. *Kansas City Stock Yards Co.*, 183 U. S. 79	26
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292	18, 22, 30

PAGE

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282 ..... 3, 11

Edwards & Browne Coal Co. v. *Sioux City*, 213 Iowa 1027; 240 N. W. 711 26

Erie R. R. Co. v. *Purdy*, 185 U. S. 148 ..... 22, 25, 26

Federal Compress & W. Co. v. *McLean*, 291 U. S. 17 15

Federal Trade Com. v. *Miller's Natl. Federation*, 23 Fed. (2d) 968 26

Fischer v. *St. Louis*, 194 U. S. 361 5

General Oil Co. v. *Crain*, 209 U. S. 211 ..... 17, 18

Great Northern R. Co. v. *Donaldson*, 246 U. S. 121 19

Independent Warehouses, Inc. v. *Saddle River*, 52 Fed. Supp. 96 ..... 8, 30

Independent Warehouses Inc. v. *Saddle River*, 132 N. J. L. 390 ..... 8, 30

Lemke v. *Farmers Grain Co.*, 258 U. S. 50 11

Mackay T. & C. Co. v. *Little Rock*, 250 U. S. 94 31

Missouri Pac. R. Co. v. *Schnipper*, 51 Fed. (2d) 749 ..... 9, 15

New Jersey Bell Telephone Co. v. *State Board*, 280 U. S. 338 12

Nippert v. *City of Richmond*, 90 L. ed. Adv. Rep. 496; U. S. 4, 13, 22, 30

Pattison & Bowns v. *Township of Saddle River*, 129 N. J. L. 135; aff. 130 N. J. L. 177 8

Schefe v. *St. Louis*, 194 U. S. 371 5

Southern Pacific Co. v. *Gallagher*, 306 U. S. 167 10

Sprout v. *South Bend*, 277 U. S. 163 ..... 12, 30

Susquehanna Coal Co. v. *South Amboy*, 228 U. S. 665 ..... 14, 15

Terrace v. *Thompson*, 263 U. S. 197 26

United States v. *Erie R. Co.*, 280 U. S. 98 9

Wadley S. R. Co. v. *Georgia*, 235 U. S. 651 26

Young, Ex Parte, 209 U. S. 123 26

Statement.

On March 27, 1946, Appellants were served with Appellees' Statement Opposing Jurisdiction, upon which is founded Appellees' motions, served the same day, to dismiss this appeal on the ground that the case presents no substantial Federal question, and the alternate motion for affirmance of the decision of the New Jersey Court of Errors and Appeals on the ground that the questions on which the decision in this cause depends are so unsubstantial as to leave no further argument. That statement and motion are included in the certified record, without designation by praecipe as provided by Rule 10, paragraph 2, of the rules of this Court.

Appellants' Statement of Jurisdiction, filed herein March 13, 1946 sets forth the grounds of jurisdiction upon which this appeal is founded, with reference to both the statutory appellate jurisdiction of this Court, and the substantial Federal questions involved in the merits of the case.

ARGUMENT.

This brief will follow the order of the numbered divisions of the statement opposing jurisdiction.

POINT 1.

Appellees assert in point 1, that the decision of the Court below is not reviewable on this appeal, for the following reasons (a), (b) and (c), which are answered under each

stated reason. In support of these reasons they cite two cases hereinafter discussed;

(a) That the validity of a statute of the United States is not drawn in question.

This case does not draw into question the validity of a statute of the United States.

(b) That the validity of a statute of any state is not drawn in question on the ground of its being repugnant to the constitution or laws of the United States.

The Assignment of Errors, the Statement of Points, the Statement of Jurisdiction, and the certified record filed herein, show that there was drawn into question the validity of an ordinance of the Township of Saddle River as being repugnant to the constitution and laws of the United States, and the court below decided in favor of its validity, within the provisions of section 237(a) of the Judicial Code (28 U. S. C. A. Sec. 344(a)). *Assignment of Errors*, paragraphs 2, 3 and 5, *Statement of Points; Statement of Jurisdiction*, paragraphs 1, 2, 15, 19, 20, 22, 23, 26-32, 34-39.

(c) That the authority of the Township of Saddle River under the laws of New Jersey to adopt the ordinance in question was settled by the decision of the New Jersey Court of Errors and Appeals and is not open to attack here.

The authority of the Township of Saddle River, under the laws of New Jersey, to adopt the ordinance in question is not involved in this appeal.

Appellants' challenge of the ordinance on this appeal, is directed to its application, and the conviction of Appel-

lants' Independent Warehouses, Inc., and James Thompson, thereunder, with respect to the attempt, by its authority, to license and regulate the business of conducting an exclusively interstate transportation facility and service, in violation of the Interstate Commerce Act (Title 49 U. S. Code; 49 U. S. C. A.), Section 1, paragraph (1) and clause (a) thereof, paragraphs (2), (3), (4), (5), (6); and Section 6, paragraphs (1), (3), (4), (5), (6), (7) and (10), *Assignment of Errors*, paragraph 2; and with respect to the abridgement and violation of appellants' rights guaranteed by the Fourteenth Amendment of the Constitution of the United States, *Assignment of Errors*, paragraphs 3, 4, 5.——

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, this court said:

(p. 289)

"That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another."

* * * * * * * * *

"Nor does it matter on what ground the court upheld and enforced the statute."

(p. 290)

"Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error." (Now appeal.)

In that case the state statute involved was not held invalid in toto, but was held invalid as applied in that case to transactions in interstate commerce.

Another case pertinent to this point, is the recent case (decided February 25, 1946) of *Nippert* v. *City of Richmond*, 90 L. ed. Adv. Rep. 496; U. S. . Since that decision is not presently available in official reported form in the Supreme Court reports, page references herein are to 90 L. ed. Adv. Op. report. That case is applicable here, not only on the question of jurisdiction of this Court on this appeal but also, upon the merits of those issues themselves. It involved a municipal licensing ordinance, and its impact upon interstate commerce as applied by the state court in that case involved the same principles here contended for by appellants.

For these reasons the *Nippert* case is also, and equally, applicable to the questions involved in points 2, 3 and 4 hereinafter discussed.

In the *Nippert* case, this court stated the question as follows:

(p. 497)

> "The question is whether a license tax laid by an ordinance of the City of Richmond, Virginia, upon engaging in business as solicitor, can be applied in the facts of this case consistently with the commerce clause of the Federal Constitution, Article I, Sec. 8".

Then the court said:

(p. 502)

> "Apart from the fact that the tax as applied here is laid directly upon sales arising only under con-

tracts requiring interstate shipment of goods, cf. 309 US 48 ff, 84 L. ed. 571, 60 S. Ct. 388, 128 ALR 876, the contentions entirely misconceive what is meant by discrimination or undue burden in the sense applicable to these problems."

* * * * * * * * *

(p. 504)

"It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences. In that blindness lies the vice of the tax and of appellee's position."

The decisions of this court relied upon by appellees in support of their above-mentioned Point 1 are *Fischer* v. *St. Louis*, 194 U. S. 361 and *Schaefer* v. *St. Louis*, 194 U. S. 373. They were companion cases arising under the same ordinance of the City of St. Louis, and the latter case was decided on the opinion in the former.

That ordinance regulated the erection and use of cow stables and dairies within the city, and involved only an exercise of the police power in the interest of public health and welfare. The cow stables and dairies involved were private enterprises, and those cases involved no question affecting, or of taxing, regulating or burdening, interstate

commerce. The issues upon which this Court took jurisdiction, and heard and decided the case, were those asserted under the Fourteenth Amendment, which were raised in the present case, as shown in Appellants' Statement of Jurisdiction, Assignment of Errors, and Statement of Points, cited above under this point.

POINT 2.

Appellees assert in Point 2 that any federal question that may exist in the present case has been so explicitly foreclosed by prior decisions as to afford no basis for an appeal; and that the present case is identical with four cases therein cited, which will be later discussed. We submit that that is a question for this Court to decide.

The facts as stated, from the opinion of the court below in the Statement Opposing Jurisdiction (pp. 1-4), are:

Erie Railroad Company is a common carrier in interstate commerce. The Coalberg plant (located in Saddle River Township, New Jersey) was operated for the benefit, on behalf, and at the sole expense (including taxes), of Erie as a public service facility for shippers of anthracite coal on Erie lines desiring storage space in accordance with, and under, rates named in a tariff on file with the Interstate Commerce Commission. Erie maintained an agent at the yard, authorized, on its behalf, to issue warehouse receipts for coal placed therein by shippers.

Coal sold at the mines (in Pennsylvania) is, by shipping contracts with the purchasers, shipped in interstate commerce over the railroad of Erie and stored at the Coal-

berg yard until, at the shipper's direction, it is again conveyed by rail to its ultimate destination. The shipper pays to the carrier a tariff charge for the in-transit storage, including unloading, reloading and the incidental services.

The opinion states the economic reasons for this storage practice, all of which advance the general welfare as well as serve the particular interest of the mine operators, shippers and carriers. All of the coal handled at Coalberg is consigned to the Coalberg plant for storage.

There is an established tariff charge for the storage, and the opinion refers (without criticism) to Appellants' contention that through its contract agencies, Erie utilizes this facility solely to provide regular tariff in-transit services to its shippers for interstate shipments of coal from Pennsylvania mines to ultimate destinations through, and beyond, Coalberg, with facilities provided by the storage of coal with a public warehouseman, as a regular transportation service facility over its line, pursuant to demands of shippers. The tariff charges for this in-transit service are collected by Erie directly from the shippers, and Erie bears the entire expense of the transit facilities.

The coal is shipped to the purchaser or his consignee at Coalberg and freight charges are collected at the published tariff rate for transportation to that point, plus storage and unloading charges, and when the coal is reshipped there is, the opinion states, "a new billing" to the ultimate destination at the through interstate rate from the point of origin in Pennsylvania to the new destination, plus reloading charges, as a continuance of the original interstate movement and the balance of the interstate through rate is paid by the shipper at Coalberg.

The fact is not disputed that, during the storage period, the coal remains in the exclusive custody of the carrier under the original shipping contract and the applicable through tariff and is subject only to the shippers' instructions as to movement out of storage.

The court below concluded that, since the ultimate destination is not determined until the owner gives shipping instructions,

> " * * * the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite time subject to the owner's disposal * * *".

(maximum tariff storage allowance 2 years), and that it was therefore subject to the state's dominion and was taxable, and that the stored coal retains that status until it is again shipped in interstate commerce.

The taxable status of the coal has nothing to do with this case. Under the laws of New Jersey, none of it was taxable against any of these appellants because they were not the owners of any of it. As against the owners of the coal in storage, it was exempt from taxation under the state statute. *Pattison & Bowns* v. *Township of Saddle River*, 129 N. J. L. 135, *affirmed* (by the Court below) 130 N. J. L. 177. The avowed purpose of this ordinance was to collect from appellants the equivalent of, or more than, the taxes which the Township could not levy against the owners of the coal. *Independent Warehouses, Inc.* v. *Saddle River*, 52 Fed. Supp. 96, 96-97; *Independent Warehouses, Inc.* v. *Saddle River*, 132 N. J. L. 390, 392.

The fact that "a new billing," or a reshipment, may occur to cover the continuation of the through interstate journey from point of origin to ultimate destination is not determinative of the question of the interstate status of the stored coal, *Baltimore & O. R. Co.* v. *United States*, 24 Fed. Supp. 734, 735, 736; *Missouri Pac. R. Co.* v. *Schnipper*, 51 Fed. (2d) 749; *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 103-104. It was the original intention of the shippers, of the original shipping contract, and of the tariffs covering the shipment, that governs (see cases cited in Appellants' Statement of Jurisdiction, paragraph 32).

In *United States* v. *Erie R. R. Co.*, 280 U. S. 98, wood pulp was imported to Hoboken, New Jersey, by shipload. Upon arrival the agent of the shipper gave to the terminal company at Hoboken instructions for shipment of parts of the cargo; two or three cars at a time, by rail to Garfield, New Jersey, and made out bills of lading, and paid the freight, covering the shipments from Hoboken to Garfield; both in New Jersey.

Although the original shipment was made to Hoboken, the Interstate Commerce Commission ordered the Erie and connecting carrier to establish and import rate applicable to that movement on a finding: [p. 101]

> "that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent on the part of the shipper that it shall be transported to Garfield."

The carriers contended, and the United States District Court for the District of New Jersey held, on a contest of that order, that the shipments under new local bills of lading from Hoboken to Garfield was an intrastate movement.

The decision of the District Court was reversed by this Court. The pertinent part of that decision reads:

(pp. 101-102)

> "But the nature of the shipment is not dependent upon the question when or to whom the title passes. * * * It is determined by the essential character of the commerce. * * * It is not affected by the fact that the transaction was initiated or completed under a local bill of lading which is wholly intrastate. * * * or by the fact that there may be a detention before or after the shipment on the local bill of lading * * *."

The asterisks in this quotation indicate the omission of citations of cases, including *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, above cited.

This Court sustained the above quoted finding of the Interstate Commerce Commission, and held that "The rail transportation is in fact a part of foreign commerce" (p. 102).

In the *Carson Petroleum* case the same contention was made, and sustained by the state court (p. 10), on a similar factual situation, as above quoted from the opinion of the court below. The opinion in the *Carson Petroleum* case exhaustively reviewed the cases on both sides of the line of distinction on this question and decided in favor of appellants' contention on this appeal. The decisions on both sides of the line of distinction on this question were also reviewed in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 174-176. In the latter case the court said that the first line of cases therein considered "makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on,

interstate commerce is invalid" (p. 174). Then follows a specification of the classes of inhibited license, or other taxes imposed by state or local authorities.

The present case involves the storage and servicing of interstate shipments of coal which are temporarily stopped for in-transit railroad storage at a point intermediate between the mines in Pennsylvania and the ultimate destinations through, and beyond, the point of storage to points in other states under through tariff routes and through tariff rates. Whether the ownership of the coal changes in the course of transit between point of origin and ultimate destination is immaterial because buying and selling of commodities for shipment in, during, or at the end of, interstate transportation is a part of the interstate commerce itself, as was held by this court in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290-291 and *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 54; both of which are cases involving, and sustaining, appellants' contentions in the present case.

In the *Lemke* case, a state licensing and regulating act was held invalid as applied to the circumstances of that case. The state's contention that it had the right to enact laws for such licensing and regulation in the exercise of the police power in the interest of the welfare of its people, was overruled as applied to interstate commerce, even though the business regulated was located within the state (p. 59). The Court held (p. 59):

> "Thus the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it."

The same principle was declared, in even broader language, in the later case of *New Jersey Bell Telephone Co. v. State Board*, 280 U. S. 338, 346-347, 349.

In *Sproul v. South Bend*, 277 U. S. 163, the municipal license tax was held invalid as applied to an interstate bus operation. That ordinance, similarly to the ordinance involved in this case, made no distinction between buses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce (p. 167). The Court held (p. 171):

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."
>
> . . . . . .
>
> "A state is equally inhibited from conditioning its exercise (the right to conduct the business) on the payment of an occupation tax[.]". (Bracketed words supplied).
>
> (p. 172)
>
> "For the ordinance is void because of the imposition of the license fee."

The decision of the court below was based upon the legal conclusion, above quoted under this point, that the business licensed was a local incident separate and distinct from interstate commerce. That was the State's contention, and

the conclusion of the State Court, in *Nippert* v. *City of Richmond*, above cited. In overruling that contention and reversing that conclusion this Court said:

(p. 500)

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result.

It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an eco-

> nomic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce."

All of the cases cited in support of Appellees' point 2 are distinguishable from the present case either because the commodity in question was in the private possession and control of the owner, or had not yet entered, or had ended, its status as interstate commerce. In none of those cases was the commodity in the custody of a common carrier, or in storage in a transportation facility, as defined in Section 1(3), under in-transit railroad tariffs which connected inbound and outbound movements and were issued and filed with the Interstate Commerce Commission under other sections above mentioned, of the Interstate Commerce Act.

In *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665, Pennsylvania coal was shipped under billing and transportation contracts ending at Perth Amboy, to be unloaded from the cars and held for future sale and distribution under new sales and shipping contracts. The producer and owner of the coal held it in its own possession with the intention of keeping a supply on hand to fill anticipated orders. That case sustained a state tax on the coal because the transportation movement and contract had ended, and the coal was at rest in the state (p. 669).

The case of *Susquehanna Coal Co.* v. *South Amboy* was distinguished in *Missouri Pac. R. Co.* v. *Schnipper*, 51 Fed. (2d) 749.

Federal Compress & W. Co. v. *McLean*, 291 U. S. 17, is not pertinent to this case. That case involved a private enterprise. The principal question, which is not involved in the present case, was whether a federal warehouse license exempted the company from the tax in question, or a license fee for operating local cotton compresses.

The opinion shows that all of the cotton handled was collected from local points in the State of Mississippi for compression "into bales of standard weight and size, suitable for shipment," whereupon the bales were "delivered to the rail carrier for interstate transportation" (p. 20).

The court said (p. 21):

> "It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce * * * its journey interstate does not begin * * * until its shipment to points of destination outside the state."

(p. 22):

> "Here the privilege taxed is exercised before interstate commerce begins * * *."

In the present case an entirely different situation exists; shipping contracts were made at points of origin in Pennsylvania for through shipment to points of ultimate destination in other states, with a stopover privilege for storage-in-transit at Coalberg. One leg of the journey, in in-

terstate commerce, had already been accomplished before storage. Whether the ultimate destination was in, or outside, New Jersey made no difference, since the first leg from the mines in Pennsylvania to Coalberg was in interstate movement and Coalberg was never intended to be its ultimate destination. The movements in and out of storage were connected by the tariff provisions and the original shipping contract as a part of one continuous interstate movement. In all cases the coal continued its journey out of Coalberg *by rail* as a continuation of its originally intended and contracted interstate transportation.

Coalberg was not a coal market, as in the *Federal Compress* case, and the *Cargill* case (later discussed), since no coal was sold at Coalberg and no coal from points in New Jersey was handled there. No services were performed at Coalberg except strictly transportation services within the definition of section 1 (3) of the Interstate Commerce Act.

Cargill v. *Minnesota*, 180 U. S. 452, is not pertinent to this case. It involved a state statute requiring a license to operate certain kinds of grain elevators, and the payment of a license fee of *one dollar* per year to be used for the purpose of grain inspection (p. 454).

The case involved a private corporation which purchased, as its own absolute property, grain hauled in by growers in the neighborhood. Cargill never handled or stored grain for others, conducted a warehouse business, or issued warehouse receipts (p. 462). It conducted a strictly private enterprise in which no railroad company was interested, and in which no transportation facility or tariff in-transit service was provided and no railroad company was involved in the action (p. 462).

The court found (p. 462):

> "But the warehouse was used, occupied, and operated by the defendant solely for the purpose of receiving, handling, and shipping its own grain in its private capacity as grain owner and merchant."

No transit grain was stored and no grain in the elevator had begun any interstate shipment (pp. 462-463).

The decision was expressly limited to the circumstances of that particular case, and the act was sustained solely as a valid *police power* regulation (p. 468) of services rendered by Cargill, a party in interest, to the farmers from whom he purchased grain, as "marketmaster, weighmaster, inspector or grader of the grain offered for sale." It was held that the rendering of these services constituted a business of a public character, sufficiently affected with a public interest to warrant regulation by the state to assure correct weights, uniform grades and proper dockage, and to avoid dishonest practices or undue advantages (p. 463, 465, 467). The case was decided upon "questions of local law" (p. 466), and did not involve any question relating to railroad property, operations, transportation facilities, or storage of property in transportation.

In *General Oil Co.* v. *Crain*, 209 U. S. 211, the oil in storage at Memphis was in the private possession and control of the oil company, where it had arrived in interstate commerce, and was intended by its owners to be again shipped under new shipping contracts in interstate commerce. The oil had reached its previously intended destination. Transportation under the tariff and original shipping contract had ended, as in the *Susquehanna Coal Company* case above discussed. No question of carrier custody on be-

half of shippers in interstate commerce, or storage-in-transit under stop-over privileges of railroad tariffs, was involved. The facts in that case are entirely different from those in the present case.

That case was reviewed in this court's opinion in *Bacon* v. *Illinois*, 227 U. S. 504, where the opinion pointed out the features which distinguished it from the present case. In *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, at pages 104-106, the opinion in *General Oil Co.* v. *Crain*, was reviewed and distinguished, as well as sharply criticized. It was stated (p. 105) that "it must be admitted that it is a close one and might easily have been decided the other way". The Court further said (pp. 105-106):

> "We do not think in deciding the case at bar that we should give the Crain case the force claimed for it by the court below and by counsel for the state. Since its decision this court has had to consider several cases where there was trans-shipment of the commodity from local carriage in a state to a ship at an export port and conveyance thence to a foreign destination. There has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through."

It is respectfully submitted that there is no difference, under the Commerce Clause and the Interstate Commerce Act, between interstate and foreign commerce. Intention has the same relevance and control in either case. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295, 296.

The statutes, and some of the cases which support Appellants' contentions in respect to this point are cited in

their Statement of Jurisdiction, paragraphs 25 to 28, inclusive.

The above quoted conclusion of the New Jersey Court of Errors and Appeals is a conclusion of law, arising under the commerce clause of the Constitution of the United States and the Interstate Commerce Act, which touches the heart—the *quod erat demonstrandum*—of this controversy. That issue is within the jurisdiction of, and should be reviewed and finally determined by, this Court on appeal, regardless of whether this Court ultimately agrees, or disagrees, with that legal conclusion of the Court below. The contention of Appellees under point 2 of their Statement Opposing Jurisdiction merely begs the question, and presents no valid grounds for dismissing the appeal, or for the affirmance of the judgments of the court below, without a hearing and determination by this Court.

POINT 3.

Appellees assert, in point 3, that this court will not review the findings of fact by the New Jersey Court of Errors and Appeals that the business of appellants, required to be licensed by the ordinance in question in this case, was not engaged in interstate commerce; that the record shows ample evidence to support the findings; and that that is as far as this Court will enter upon a consideration of the question. Obviously, this Court must review the record, and consider the case, in order to determine the adequacy of the evidence upon which the decision below was presented.

The single case cited in support of these assertions is *Great Northern R. Co.* v. *Donaldson*, 246 U. S. 121. That

was a suit for personal injury damages tried before a jury. The factual questions involved related to the negligence of the company. This Court, nevertheless, did review the judgment of the state court on writ of error, and satisfied itself that the findings of fact in the court below were supported by the evidence (p. 123). What it said was (p. 124):

> "In this situation it is enough to say that it is not the province of this court to weigh conflicting evidence."

In the present case all of the evidence showing the interstate nature, character and extent of the transportation business sought to be taxed and regulated under the ordinance in question was presented, without conflict, by Appellants' officers and witnesses. Not one word of evidence was offered on behalf of Appellees in respect thereto, and Appellants' evidence was not contradicted in any respect.

The opinion of the court below did not review all of the evidence, or even refer to, or mention, a large part of it. The opinion refers to only a fragment of the testimony of only one witness. Appellants should not be precluded from the right to have this appeal heard, and determined, on the entire record brought before the Court.

This case depends primarily upon the question whether the coal in storage is in interstate commerce, and, therefore, whether the business sought to be taxed and regulated under this license ordinance is interstate commerce. If Appellees' contention under this point 3 is sound namely, that this Court cannot review and decide, as a question of federal law, the legal conclusion of the Court below that the business of appellants at Coalberg is intrastate,

and not interstate, business, it would be impossible for this Court ever to pass upon such federal questions in any form of review, and the provisions, and purposes, of section 237 of the judicial code could, in every case, be defeated and frustrated by a similar finding, or conclusion, by a state Court. Countenance of such a contention would also defeat, and frustrate, the very purpose and function of this Court as a court of last resort for the final determination of questions arising under the Federal Constitution and laws.

The cases in which similar contentions have been made by appellees on appeal, or defendants on writ of error, are too numerous to cite, nevertheless this Court has reviewed, and decided, them.

This contention of Appellants claims too much, and is ineffective as support for a motion to dismiss this appeal, or for affirmance of the judgments below, without a hearing and determination of the substantial Federal questions presented.

POINT 4.

In their point 4, Appellees assert that this Court will accept the view of the New Jersey Court of Errors and Appeals that the ordinance in question applied only to intrastate commerce, and as to the scope and operation of the ordinance, and hence that no Federal question arising under the Commerce Clause of the Constitution is here for determination.

In the first place, the court below did not decide that this ordinance applied only to intrastate commerce. It

decided, as shown under point 2, that the business conducted at Coalberg was not interstate commerce, as contended by Appellants, and that, therefore, the ordinance was valid as applied thereto.

This assertion of Appellees is similar to that above discussed under points 2 and 3, and our discussion under those two points is included here by reference, and without repeating, under this answer to Appellees' point 4.

In *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294, this Court said:

> "As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts."

The case of *Nippert* v. *City of Richmond*, above mentioned in points 1 and 2 is also pertinent under this point 4.

In support of this assertion 4, Appellees cite the single case of *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148. In that case the New York Court of Appeals expressly held that the statute in question was intended to apply, and applied, only to domestic (intrastate) transportation (p. 152), and no attempt was made to apply it to interstate commerce in any form.

This Court accepted that conclusion on the assumption that the act did not require the railroad company to issue mileage tickets covering the transportation of passengers

from one state to another (p. 152). The decision of this Court turned on the question whether a federal question had been seasonably raised in that case and it decided that question in the negative.

The following portions of that decision show the factual distinction between that case and this concerning the existence of a federal question.

(p. 152)

"But the defendant insists that the general allegation in each of its answers; namely, that the statute besides being void as a regulation of interstate commerce, was in violation 'of various other provisions' of the Constitution of the United States, was sufficient to have enabled him, at the trial, to insist that the statute upon which the actions were based was repugnant to the 14th Amendment of the Federal Constitution. If the answer had contained no such specific allegation, still, if at the trial of the case the defendant had, in stating the grounds of his motion for nonsuit, or in some other way, distinctly claimed that the statute on which the actions were based was inconsistent with that Amendment, then it would have been the duty of the court of appeals to determine the question so raised, unless it was waived by the defendant when the case was before that court, or unless its determination could properly be and was placed upon some ground of local or general law adequate to dispose of the case. We state the matter in this way because, as said in *Carter* v. *Texas*, 177 U.S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687, 689, 'the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Fed-

eral question, *in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state*'." (Italics ours.)

(p. 153)

"So, if the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute, or authority exercised under the United States, this court could review that judgment, although no Federal question was distinctly raised or insisted upon in the trial court."

(p. 154)

"Of course, if upon examining the record this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, *then our jurisdiction would not have been defeated by the mere failure of the highest court of the state to dispose of the question so raised, or to pass upon the right or immunity so claimed.*" (Italics ours).

In the present case the federal questions were raised, presented; argued and decided throughout every stage of this litigation from its beginning up to the present time. *Appellants' Statement of Jurisdiction*, paragraphs 15, 19, 20, 22, 23, 30; *Assignment of Errors*, paragraphs 2, 3, 4, and 5; *Statement of Points*.

The above quotations from the decision in *Erie R. R. Co. v. Purdy*, conclusively demonstrate that Appellees' assertion in their point 4 has no merit in this case.

POINT 5.

Appellees in point 5 of their Statement Opposing Jurisdiction, assert that (a) there is no support in the record that appellants were deprived in any respect of due process of law or the equal protection of the laws, and that (b) a reasonable tax was imposed on the applicants applicable to all in the same general classification.

Assertion (a) begs the question presented for determination in the paragraphs of Appellants' Statement of Jurisdiction and Statement of Points listed above in next to the last paragraph of the discussion of point 4, and more particularly in paragraphs 3, 4, and 5 of the Assignment of Errors. Those questions are issues of Federal law in this case, and cannot be finally determined except on review in this Court. A naked assertion that the record contains no support for these contentions of Appellants is insufficient to deprive Appellants of the right to a review of an adverse decision in the court below, and a hearing and final determination of those federal questions in this Court.

These questions arise from the terms and provisions of the ordinance, as applied to Appellants, including employees, and their application to the business conducted at Coalberg, if Appellants' contentions are correct, under numerous decisions of this Court, including those cited above and in paragraphs 26, 27 and 28 of Appellants' Statement of Jurisdiction.

The direct, positive and uncontradicted evidence in this record shows that the storage and handling of coal at Coalberg involved no question of the health, welfare or safety of the community or its rseidents (Cert. Record 247). No evidence was offered on behalf of Appellees, and the Court below made no finding, to the contrary. The ordinance does not purport to have been enacted as an exercise of the police power. It expressly states that the license tax imposed thereby was for *revenue*.

The penalty provisions of paragraph 7 of the ordinance give rise to properly and seasonably raised questions of denial of due process and of equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution, which the court below expressly declined to decide, as it was its duty to decide, *Erie Railroad Co.* v. *Purdy*, 185 U. S. 148, at page 154, as above quoted under point 4. Some of the pertinent decisions showing the existence and importance of these Federal issues, are—*Wadley S. R. Co.* v. *Georgia*, 235 U. S. 651, 662; Ex Parte *Young*, 209 U. S. 123, 145, 163; *Edwards & Browne Coal Co.* v. *Sioux City*, 213 Iowa 1027, 240 N. W. 711; *Federal Trade Com.* v. *Millers' Nat'l Federation*, 23 Fed. (2d) 968; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 102; *Terrace* v. *Thompson*, 263 U. S. 197.

Those decisions also deal with the question of the intimidation of employees who were, as in this case, subject to penalties for the failure of their employers to comply with statutes or ordinances, involved, and who were exposed, as here, to cumulative daily panalties for failure of their employers to comply with the statute or ordinance.

Assertion (b) has two branches (1) the reasonableness of the license tax and (2) the applicability of the ordinance to all in the same general classification.

(1) The assertion of reasonableness is based on the finding of the court below that the tax imposed by the ordinance in question is reasonable, without determining the amount of the annual tax. That was one of the questions at issue throughout the litigation in the state courts. It was decided favorably to Appellants by the New Jersey Supreme Court (certified Record, p. 391) and adversely to Appellants in the New Jersey Court of Errors and Appeals.

Throughout this controversy the municipal authorities have never stated, and have persistently refused to indicate, the correct amount of the annual license fee required by the ordinance for the business conducted at Coalberg, and nowhere throughout this litigation in the state courts has either court decided what was the correct amount of the annual license fee applicable to that business under the provisions of the ordinance.

The only indications that have appeared are the following:

The complaints upon which Independent Warehouses, Inc. and James Thompson were convicted alleged violation at the place or premises shown on Block 106-D known as Coalberg, (Certified Record, pp. 7-8), which contains 2,730,296 square feet. At ¾ of a cent per square foot, as the ordinance provides, the annual license fee would amount to $20,475, which is the exact amount of the assessed valuation upon which property taxes were paid on that parcel of land for 1943, the year in question (Ex. P-2, Cert. Record, pp. 26, 182).

The New Jersey Supreme Court estimated (without stating how the amount was arrived at) the annual license fee at "about $11,000." (Cert. Record p. 390).

The only reference in the opinion of the New Jersey Court of Errors and Appeals to the area involved is 67¼ acres (copy of op. attached to Appellants' Statement of Jurisdiction, p. 4, last line). That area is equivalent to 2,929,410 square feet. At ¾ of a cent per square foot, the annual license fee on that area would be $21,970.57. The assessed valuation upon which property taxes were paid on that area in 1943 was $21,747., or $227.50 *less* than the annual license fee (Ex. P-2, Cert. Record, pp. 26, 181).

The undisputed evidence in the record, and the finding of the Court below, show that the license tax sought to be imposed under this ordinance upon Erie's contract agents, would fall on Erie and become a direct charge upon the transportation facilities and service used and rendered by it under its storage-in-transit tariff, and must be borne out of the tariff charges for interstate transportation.

The ordinance itself, and the undisputed evidence in the record, shows that the license fee sought to be imposed upon appellants bears no relation, and was not intended to bear any relation, to the volume of the business or its revenues, or the value of the privilege to be licensed. This ordinance did not fix a flat, or specified, annual license fee. The exact amount is undeterminable from the ordinance itself, but is left to computation by the applicant, or the Township officials, and the latter have never been able, or willing, to determine that amount.

All other licensing ordinances of the Township of Saddle River, licensing 36 different businesses (none of which

apply to employees of such business), prescribe flat annual license fees ranging from one dollar up to a maximum of five hundred dollars for outdoor carnivals and rendering plants. (Cert. Record, pp. 79-80.) In 1943 (the year of appellants' prosecution under the ordinance in question) the total revenue of the Township from all other business licenses was $4,374. (Cert. Record, p. 306). A comparison of that total license revenue from all other businesses licensed with any of the amounts above-indicated as a possible, or probable, annual license fee under the ordinance here in question, for the privilege of conducting this one legitimate business at Coalberg indicates a very real issue of unreasonableness, and other issues, arising under the Fourteenth Amendment, which this Court should hear and determine.

All real and personal property, and all corporate and franchises, taxes assessable under the laws of New Jersey against each and all of appellants have been regularly assessed, and the taxes thereon have been regularly paid by them. This proposed annual license tax for the privilege of conducting the business is not in lieu of, but is in *addition* to, all of those assessments and taxes. Under those circumstances, the large amount of the license tax, however computed, supports Appellants' contentions, and the view of the New Jersey Supreme Court, that this ordinance constituted an "unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power." (Cert. Record p. 391.)

The uncontradicted positive evidence in this record shows that an annual license fee in any of the amounts above indicated would be prohibitive and would prevent the continuance of the business (Cert. Record pp. 181-182,

245-47). There is not a word of evidence in this record to support the finding to the contrary by the court below.

(2) The assertion of general application of the ordinance to all business in the same general classification, is true in so far as the face of the ordinance is concerned. The undisputed evidence in the record shows that the ordinance was adopted for sole application to the Coalberg in-transit transportation facility, and that there is no other "place or premises" or facility or "business" in the Township of Saddle River to which the ordinance was applicable (Cert. Record, pp. 230, 312). These undisputed facts are shown, not only by this record but also, by the findings of two court decisions in this litigation, *Independent Warehouses, Inc.* v. *Township of Saddle River*, 52 Fed. Supp. 96, 96-97; *Independent Warehouses, Inc.* v. *Township of Saddle River*, 132 N. J. L. 390, 392 (Cert. Record, p. 390). Those facts and findings were not disturbed or criticized by the court below.

Pertinent to this sub-division of Appellees' assertion 5 are the decisions in *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, at page 294, from which a quotation is above given under point 4 and *Nippert* v. *City of Richmond*, 90 L. ed. Adv. Op. 496, at pages 501-502; U. S. . . , in which this very contention was overruled.

In *Sproul* v. *South Bend*, 277 U. S. 163, the court criticized the license fee of $50. per year because it was not imposed as an incident, or to defray the expenses, of municipal regulation, and because it was not shown "that the amount collected under the ordinance was no more than was reasonably required for such a purpose." Then the Court said (pp. 169-170):

"It follows that the exaction of the license fee cannot be sustained as a police measure."

* * * * * * * *

"It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city."

That decision, the *Crew Levick* case, the *Nippert* case, and many others above cited, show that Appellees' assertions in point 5 involve Federal questions within the express jurisdiction and particular function of this Court to consider and determine on review of judgments of state courts.

Appellees cite, in support of their assertions in Point 5, the case of *Mackay T. & C. Co.* v. *Little Rock*, 250 U. S. 94. That case involved a municipal ordinance to license telephone poles and cables—poles at 50¢ each and cables at rate of 4 poles per block. The total amount of the tax involved 205 poles at 50¢ each for 4½ years, or $461.25 (pp. 96-97). This was not a tax on the privilege of doing business, but a franchise tax for the use and occupancy of the public streets. No mention is made in the opinion of other property taxes upon the pole line.

It was a general ordinance applicable to all telephone lines. There were two other telephone companies in the city (p. 98), and the tax was the same as to all. The ordinance had been accepted in writing as a contract between the company and the city (p. 96).

The court said (p. 98):

"We are unable to see ground for dismissal of the writ of error, and will pass at once to the merits."

The state Court treated the license fee as a license tax and this Court so regarded it (p. 98).

No question was raised under the commerce clause of the constitution, hence, the Court stated that it was not at liberty to revise the decision upon the question of construction but could only determine whether as construed and applied the ordinance deprived plaintiff of rights secured by other provisions of the constitution and laws of the United States (p. 99).

The Court held that a reasonable tax upon the maintenance of poles and wires erected and maintained by the telegraph company within the city limits pursuant to authority granted by its ordinances, is not an unwarranted burden upon interstate commerce and does not infringe rights conferred by the Act of Congress (p. 99).

It held that the city may impose such taxes not merely with respect to the special and exclusive occupancy of streets and other public places by poles and other equipment (under franchise granted by the city), but also by way of compensation, for the special cost of supervising and regulating the poles, wires and other fixtures and in issuing the necessary permits.

The Court held that there was no support in the record for the contention that the tax of 50¢ per pole per year was unreasonable, or that the telephone company was subjected to unreasonable discrimination in contravention of the equal protection clause of the 14th Amendment (p. 100).

The Court held that there was no offer to show an arbitrary and an intentional unfair discrimination in the administration of the ordinance, and that there was no offer to

show discrimination in the application of the tax as among the three telephone companies who maintained pole lines under the ordinance.

In all respects above mentioned the *Mackay* case differs from the facts and issues in the present case.

Conclusion.

For the above reasons it is respectfully submitted that an order noting probable jurisdiction should be entered and that the motion to dismiss the appeal, and the alternate motion to affirm the judgments of the court below, should be denied.

CLEMENT K. CORBIN,
Attorney for Appellants, Independent Warehouses, Inc. and James Thompson.

WILLIS T. PIERSON,

DUANE E. MINARD,
Attorneys for Appellants, Pennsylvania Coal Company, and Erie Railroad Company.

Service of the foregoing Brief is hereby acknowledged this 15th day of April, 1946.

HARRY LANE,
Attorney for Appellees.